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IN THE

Supreme Court of the United States

October Term, 1965
No. 832

WORLD AIRWAYS, INC.,

Petitioner,

vs.

NATIONAL MEDIATION BOARD: FRANCIS A. O'NEIL, JR., individually and as Chairman of the National Mediation Board; LEVERETT EDWARDS, individually and as member of The National Mediation Board; and HOWARD G. GAMSER, individually and as member of The National Mediation Board,

Respondents.

WORLD AIRWAYS, INC., EDWARD J. DALY and PETER T. CRAVEN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

	Page
Opinions below	2
Grounds of jurisdiction	2
Questions presented	2
Statute involved	3
Statement of the case	4
Reasons for granting the writ	10
Conclusion	23
Opinion of the United States Court of Appeals for the Ninth Circuit	App. p. 1

TABLE OF AUTHORITIES CITED

Cases	Page
American Airlines, Inc., 1 NMB Determinations 371	16
American Optical Co. v. New Jersey Optical Co., 50 F. Supp. 806	22
Briggs v. Pennsylvania R. Co., 334 U.S. 304	22
Britton v. Dowell, Inc., 243 F. 2d 434	22
Brotherhood of Ry. & S.S. Clerks v. Association for the Benefit of Non-Contract Employees, 380 U.S. 650	2, 9, 12, 13, 14, 15, 17, 20, 21
Emich Motors Corp. v. General Motors Corp., 229 F. 2d 714	22
FEIA v. Eastern Airlines, 208 F. Supp. 182, aff'd 307 F. 2d 510 cert. den. 372 U.S. 945	11
FEIA v. Eastern Air Lines, 311 F. 2d 745 cert. den. 373 U.S. 924	11
Foman v. Davis, 371 U.S. 178	22
OCAW v. Delta Refining Co., 277 F. 2d 694	22
Pan American World Airways v. FEIA, 306 F. 2d 840	11
Sears, Roebuck & Co. v. Marhenke, 121 F. 2d 598	22
Southern Pilot's Ass'n v. CAB, 323 F. 2d 288, cert. den. 376 U.S. 954	12
Switchmen's Union v. National Mediation Board, 320 U.S. 297	11, 12
Trans-Texas Airways, Inc., and North Central Airlines, Inc., 3 NMB Determinations 16	15

Page

Transcontinental & Western Air, Inc., 1 NMB Determinations 417 16

United Air Lines, Inc., 3 NMB Determinations 56 ..... 16, 17

Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515 12

Rules

Federal Rules of Civil Procedure, Rule 15 21

Statutes

Railway Labor Act, Sec. 2 (Fourth) 4

Railway Labor Act, Sec. 2 (Ninth) 3, 5, 9, 16

48 Statutes at Large, p. 1185 4

48 Statutes at Large, p. 1188 3

49 Statutes at Large, p. 1189 4

United States Code, Title 28, Sec. 1254(1) 2

United States Code, Title 28, Sec. 1331 7

United States Code, Title 28, Sec. 1337 7

United States Code, Title 28, Sec. 1345 7

United States Code, Title 45, Sec. 151 4

United States Code, Title 45, Sec. 152 (Fourth) 4

United States Code, Title 45, Sec. 152 (Ninth) 3, 4, 5, 9

United States Code, Title 45, Sec. 160 19

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled cases on June 21, 1965.

Opinions Below.

The Court of Appeals for the Ninth Circuit wrote a single opinion covering both cases. This opinion, annexed as an appendix to this Petition, is reported at 347 F. 2d 350. No opinion was written in connection with the order of the district court reviewed in the Court of Appeals.

Grounds of Jurisdiction.

The judgment of the Court of Appeals was entered on June 21, 1965. A Petition for Rehearing, filed by Petitioners herein, was denied by the Court of Appeals by order dated November 17, 1965. By an order dated November 24, 1965, Judge Duniway of the Ninth Circuit Court of Appeals stayed the issuance of the Court's mandate pending the filing, consideration and disposition of a petition for writ of certiorari, providing such petition is filed with the Supreme Court of the United States by December 17, 1965. The jurisdiction of this Court is invoked under the provisions of Section 1254 (1), Title 28 of the United States Code.

Questions Presented.

1. Whether the decision of the Court of Appeals for the Ninth Circuit, by failing to consider whether the National Mediation Board had performed its duty to investigate a representation dispute among certain employees of World Airways, Inc., is a decision of a federal question in conflict with the holding of this Court in *Brotherhood of Ry. & S.S. Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, (1965).

2. Whether the National Mediation Board failed to perform its duty to investigate a representation dispute

when it established among employees of World Airways, Inc., three separate crafts or classes corresponding to the classifications of pilot, flight engineer and flight navigator without having formulated any policy, uniformly applied to like cases, governing craft or class determinations among such employees in the air transport industry and without any examination of relevant factors bearing on its determination in the case of World Airways.

3. Whether the mandate of the Court of Appeals, directing the district court to dismiss World Airways' action in *World Airways, Inc. v. National Mediation Board* and to dismiss the counterclaim of World Airways and issue an injunction as prayed for by the United States in *United States v. World Airways, Inc.*, abridges the right of Petitioners to amend or supplement their pleadings in the district court.

Statute Involved.

The statutory provisions involved are contained in Section 2, Ninth of the Railway Labor Act, 48 Stat. 1188, 45 U.S.C. § 152, Ninth, set forth below:

> "If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in

the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

45 U.S.C. § 152, Ninth.

Statement of the Case.

These cases arise under the Railway Labor Act (45 U.S.C. § 151 *et seq.*), a federal statute amended to appear in substantially its present form in 1934 (48 Stat. 1185) and extended to air carriers in 1936 (49 Stat. 1189). The Act is designed to regulate labor-management relations in the fields of rail and air transportation. Section 2, Fourth, of the Act (45 U.S.C. § 152,

Fourth) establishes the right of employees to organize and bargain collectively and provides that "the majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of the Act." In order to resolve disputes over employees' choice of a representative, the Act creates the National Mediation Board, an independent agency in the executive branch of the Government. The Board's services may be invoked by any labor organization which claims to represent a group of employees. Upon the filing of an application the Board investigates the dispute and determines who is the authorized representative, if any, of the employees concerned. In resolving representation questions, the Board, or a neutral committee appointed by it, establishes one or more crafts or classes among the employees involved. Those within a craft or class participate in the process of deciding the question of representation for that group. If the employees in a craft or class determined by the Board select a representative, it is certified by the Board to the organizations which participated in the dispute and to the carrier. Under Section 2, Ninth, of the Act (45 U.S.C. § 152, Ninth) receipt of the certification obliges the carrier to "treat," or bargain, with the authorized representative of the craft or class.

World Airways, Inc., is a United States supplemental air carrier subject to the Railway Labor Act. At the time these cases commenced its operations consisted of passenger and all-cargo flights under contract with the Military Air Transport Service between Travis Air Force Base, California, and Air Force bases in the Pacific Ocean area and the Orient and between Air Force bases within the continental United States, mixed passenger/cargo flights for Western Electric Co. between

Oakland, California, and Kwajalein Island and miscellaneous commercial passenger and cargo charter flights [R. 88-90*].

The representation dispute which gave rise to this litigation was initiated by the filing of an application by the International Brotherhood of Teamsters [R. 15, lines 11-16]. The application covered the classifications of World Airways' airline pilots, flight engineers and flight navigators [R. 70]. The Board began its investigation shortly after the application was filed by requesting World to supply the number of employees covered by the application [*Ibid.*]. During the ensuing correspondence World raised the question of the proper craft or class determination to be made among the employees as well as a question regarding the form of ballot which the Board at that time employed in conducting elections [R. 76, 79]. The carrier took the position that the only proper craft or class among employees in the three classifications was the entire cockpit crew and requested a hearing on the craft or class issue; at the same time the carrier requested the Board's assurances that the ballots used by the Board in conducting any election among World's employees would provide an opportunity for the employees to vote against representation [R. 79]. The Executive Secretary of the Board rejected the request for hearing and stated that the Board would continue to use its customary form of ballot [R. 86]. The same official of the Board informed a representative of the carrier by telephone that its pilots, flight engineers and flight navigators were regarded by the Board as three separate crafts or classes [R. 68].

*All citations to the record are to the record in *World Airways, Inc. v. National Mediation Board, et al.*, unless otherwise indicated.

Thereafter World Airways refused to supply the Board with a list of the names and mailing addresses of its employees, a list which the Board requires in order to check the names on the petitioning organization's authorization cards from employees and to arrange for an election conducted by mail. Petitioner also filed suit against the Board and its individual members in the United States District Court for the Northern District of California, Southern Division. Jurisdiction rested upon 28 U.S.C. §§ 1331 and 1337.

The United States later filed a complaint in the same district court against World and two of its officers, invoking jurisdiction under 28 U.S.C. § 1345. World answered and counterclaimed, and both parties moved for preliminary injunctions. By its motion the United States sought to compel World Airways to give the Board access to World's books and records [*United States of America v. World Airways, Inc., et al.*, R. 7-8]. The motion of World Airways was for an order restraining the Board and its members from conducting an election or certifying a representative without granting World a hearing on the craft or class issue and from conducting an election in which the ballot did not permit employees to vote against representation [R. 106-108]. In *World Airways, Inc. v. National Mediation Board, et al.* the Government moved to dismiss the complaint or, in the alternative, for summary judgment [R. 11-14], while World requested the same relief it sought by its motion in *United States of America v. World Airways, Inc., et al.* [R. 53-54]. Both cases were heard together and, on May 7, 1964, the district court entered orders denying all motions of both parties

> ". . . without prejudice to either party to renew such motions (a) at such time as is finally deter-

mined, in the cases *United Air Lines, Inc. v. National Mediation Board, et al.*, D.C. Cir. No. 17,777; *National Mediation Board, et al. v. Association for the Benefit of Non-Contract Employees,* D.C. Cir. No. 18,068; and *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. Association for the Benefit of Non-Contract Employees,* D.C. Cir. No. 18,072, the power of the National Mediation Board to utilize, in elections conducted by the Board to determine the representative of employees for purposes of collective bargaining under the Railway Labor Act, a form of ballot which does not permit an eligible employee to cast a valid ballot against representation, or (b) at such time as the National Mediation Board agrees that in any election conducted among the employees of World Airways, Inc., in any craft or class there shall be used a form of ballot which permits an eligible employee to cast a valid ballot against representation, whichever is earlier" [R. 103-104].

World Airways appealed from the denial of its motion in *World Airways, Inc. v. National Mediation Board et al.* and both the United States and World appealed from the denial of their motions in *United States v. World Airways, Inc., et al.*

In these two cases World Airways sought essentially the same relief: judicial determination that (1) the National Mediation Board was required to accord World a hearing on the Board's determination of craft or class among World's employees and that (2) the Board was

obliged to include on the form of ballot it utilized in conducting representation elections an opportunity for eligible employees to vote against representation. While these cases were pending in the Ninth Circuit this Court held, in *Brotherhood of Ry. & S.S. Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965), that the Board's ballot, as altered by the Board during the course of that litigation, is not subject to judicial review, that the Board is not required to conduct hearings in craft or class determinations and that carriers are not entitled to any participation in the process by which the Board determines crafts or classes among their employees. This Court also held, however, that the Board is bound, under Section 2, Ninth of the Railway Labor Act (45 U.S.C. § 152, Ninth), to "investigate" a representation dispute and that the question whether the Board performed that duty in a particular case is judicially reviewable. Further, since the Court in the *Railway Clerks* case examined the contention that the Board had not investigated properly the dispute among the carrier's employees at the instance of the carrier, United Air Lines, the Court necessarily determined that a carrier whose employees are involved in a representation dispute has standing to invoke review of the Board's investigation. This Court's decision of course eliminates from further consideration any issue as to the Board's form of ballot. But there remain most serious questions surrounding the Board's performance in this case of its statutory duty to investigate.

Reasons for Granting the Writ.

Petitioners in this case request the Court to consider a most significant question in the administration of an important federal statute—the scope of the National Mediation Board's duty to investigate representation disputes under the Railway Labor Act.

The determination of the proper craft or class in the course of resolving a representation dispute is one of the most delicate and important of the Board's functions under the Act. Unless employee groupings are established rationally to reflect such factors as similarity of skills, wages, hours and other terms and conditions of employment among all employees within the craft or class, organization of the employees will only frustrate the process of collective bargaining it was designed to implement. Worse, organization under such conditions is likely to promote dissension and rivalry among employees and lead to continual representation disputes as disadvantaged groups within the poorly determined craft or class enlist rival organizations to challenge the incumbent. On the other hand splintering into multiple crafts or classes of a homogeneous group of employees whose work is interconnected and interdependent makes it difficult for the parties to develop and maintain a coherent and consistent set of policies governing the employment relation of the arbitrarily divided group, particularly where different organizations represent the employees or where negotiations are conducted at different times. The drawing of artificial craft or class lines is bound to have a deleterious impact on wage and benefit structures and on promotions, transfers and seniority.

Badly conceived craft or class determinations may also create jurisdictional disputes and amplify needlessly the strains of adjustment to rapidly changing technology by perpetuating a craft or class which has lost its foundation in the state of the act, For example, the introduction of jet aircraft, bringing with it changes in the number of flight personnel needed and the nature of the skills required, has produced a collision between the Airline Pilots Association and the Flight Engineers International Association over control of the so-called "third seat in the cockpit," with the President's Commission on the Airlines Controversy (Feinsinger Commission) recommending that the third crew member be pilot qualified, a position which FEIA adamantly opposed. The series of strikes and lawsuits which the conflict generated has been documented on the front pages of newspapers, in reports of Emergency Boards appointed by two Presidents and in the official reports of Federal court decisions.[1]

Congress has located the responsibility for making the sensitive and supremely important determinations of craft or class in the National Mediation Board. Judicial review of the merits of its determinations is very limited or nonexistent. This Court has held, in *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943), that the federal courts are without jurisdiction to review Board determinations, at least at the request of a labor organization. Whether an employer

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[1]See, *e.g.*, *FEIA v. Eastern Air Lines*, 311 F. 2d 745 (2d Cir.) *cert. denied*, 373 U.S. 924 (1963); *Pan American World Airways v. FEIA*, 306 F. 2d 840 (2d Cir. 1962). The court in *FEIA v. Eastern Airlines*, 208 F. Supp. 182 (S.D. N.Y.), *aff'd*, 307 F. 2d 510 (2d Cir. 1962), *cert. denied*, 372 U.S. 945 (1963), describes the conflict at length.

could secure review of the Board's action in a suit to compel bargaining under a certification (see *Virginian Ry. Co. v. System Federation No. 40,* 300 U.S. 515 (1937)) is a question left open by *Switchmen's Union,* but even if review were open in a suit to enforce the certification, such a proceeding furnishes only one of the avenues open to a labor organization armed with a certification. There are other alternatives, such as a strike or a proceeding before the Civil Aeronautics Board to condition a carrier's certificate on bargaining with the organization, and in a proceeding of this kind the CAB will not review the Mediation Board's action (see *Southern Pilot's Ass'n v. CAB,* 323 F. 2d 288 (D.C. Cir. 1963), *cert. denied,* 376 U.S. 954 (1964). All that this Court held in *Brotherhood of Ry. & S.S. Clerks v. Association for the Benefit of Non-Contract Employees, supra,* was that a carrier could secure review of the adequacy of the Board's investigation, not review of the merits of the determination itself. Where an administrative agency is left so much on its own, almost entirely dependent on its own expertise, standards of care and sense of responsibility in the implementation of an important Congressional policy, it becomes crucial that the courts hold the agency to minimal standards of investigative procedure so that the agency does not allow itself to reach decisions in ignorance or disregard of the facts which its expertise is supposed to qualify it to judge. As distinguished from the actual drawing of craft or class lines, this is a traditional task for which the courts are well equipped. Standards governing the performance of that task, imposed by *Railway Clerks,* urgently demand elucidation.

In its treatment of these cases the Court of Appeals for the Ninth Circuit failed to perform this function. The court below disposed of these cases on the narrow ground, based upon an unduly restricted reading of *Railway & Steamship Clerks,* that the Board need not grant carriers the relief World had demanded—a hearing in which it could participate as a party. On this view of the matter the issue is simply one of pleading; since World had requested that it be granted a hearing on the Board's craft or class determination and since it has now become clear that carriers have no right to hearings in such cases, it follows that World has no cause of action in its case against the Board and no defense to the Government's action against it. The court therefore did not reach the issue of the adequacy of the Board's investigation.

In dealing with these cases in this manner the court below erred. Although the Board need not conduct hearings and is not required to allow carriers any participation whatsoever in making craft or class determinations, it is compelled to investigate before deciding and to make "such investigation as the nature of the case requires" (*Brotherhood of Ry. & S.S. Clerks v. Association for the Benefit of Non-Contract Employees,* 380 U.S. 650, 662 (1965)). The Court enunciated this principle in response to the sweeping demand of United Air Lines that the Board be required to conduct a hearing on its craft or class determination affecting United's employees and that United be afforded the status of a party in interest at the hearing. United's complaint alleged essentially the same matters as did World in its pleadings in the district court and claimed the same relief. Refusing to grant United a hearing

before the Board as the carrier had requested, this Court nevertheless carved out from the broad claim advanced by United a slender area of review and, within that area, examined the Board's action on the merits. Under *Railway Clerks,* the court below was required to do no less.

If the court had done so, it must have concluded that the Board failed in this case to carry out its duty of investigating the dispute. This Court rejected the contention of United Air Lines in *Railway Clerks* that the Board had fallen short of the measure of its duty in investigating a representation dispute among certain of United's employees. However, in that case United sought to have the Board reexamine its determination of many years standing that "clerical, office, stores, fleet and passenger service" employees constitute a proper craft or class and to divide that grouping into three separate crafts or classes. United had participated in the original hearing which resulted in the establishment of the clerical, office, stores, fleet and passenger service craft or class, it had submitted a statement in opposition to that determination in a later case involving the craft or class, it had participated in a subsequent case in which it took the position, adopted by the Board, that the application of a labor organization for investigation of a dispute among a group of United's employees was inappropriate as involving only segments of the clerical, office, stores, fleet and passenger service craft or class and it had objected to the application of the Brotherhood of Railway and Steamship Clerks at the outset of the representation dispute underlying the litigation on the ground that the application, later amended to meet United's objection, did not conform to the craft or

class. The Board had adhered consistently to its original determination on the propriety of the craft or class, departing from it only in *Trans-Texas Airways, Inc., and North Central Airlines, Inc.*, 3 NMB Determinations 16 (1956), in which it permitted stock and storeroom employees only to constitute a separate craft or class. As this Court explained: "Neither of these airlines had participated in the 1946 proceedings. Both were feeder lines, and in both cases the contending unions disagreed as to the appropriate unit in which the election should be held." (*Brotherhood of Ry. & S.S. Clerks v. Association for the Benefit of Non-Contract Employees, supra,* at 664-65.)

The Board requested and considered a statement from United and, even after scheduling an election, accepted and studied United's "detailed application" for reconsideration of the craft or class determination (see *id.* at 144). This procedure was held to satisfy the Board's duty to investigate the dispute in the light of the historical development of the clerical, office, stores, fleet and passenger service craft or class.

This is a completely different case. Here, the representation dispute involves pilots, flight engineers and flight navigators. The Board has determined that these three classifications of World Airways' employees, constitute three separate crafts or classes although, taken together, these classifications make up the cockpit crew, a closely intermeshed team performing mutually supporting duties involving the exercise of related and overlapping skills.

The teaching of *Railway Clerks* is that "in dealing with the sufficiency of the investigation it is necessary to examine the experience of the Board through the years

in resolving question[s] of craft or class appropriateness" (*Id.*, at 662). The history of Board determinations among members of the cockpit crew demonstrates that the Board has no established policy governing this type of craft or class determination. The Board first held, in *American Airlines, Inc.*, 1 NMB Determinations 371 (1944), that flight engineers were not a separate craft or class but part of the craft or class of airline mechanics. However, in *Transcontinental & Western Air, Inc.*, 1 NMB Determinations 417 (1945), the Board determined that the carrier's flight engineers constituted a separate craft or class. The Board did not overrule its earlier determination in *American Airlines, Inc., supra;* on the contrary it carefully compared the evidence introduced in the two cases to show that its different determinations were based upon contrasting factual matrices. In 1961 a neutral committee appointed by the Board to investigate a representation dispute at United Air Lines decided that "all flight deck crew members of United Air Lines, Inc., in the job classifications of pilot or captain, reserve pilot, co-pilot and second officer or flight engineer constitue one class or craft for purposes of representation and collective bargaining under the Railway Labor Act and should be voted together on one ballot for the purposes of representation under Section 2, Ninth, of the Railway Labor Act, as amended" (*United Air Lines, Inc.*, 3 NMB Determinations 56, 72-73 (1961)). This decision was reached after a hearing of forty days duration and upon a record of 5,121 pages of testimony and 595 exhibits (3 NMB Determinations at 56). The Board's neutral committee stated that:

> Generally speaking then, we find that the years have brought with them a high degree of crystalliza-

> tion in crafts and class lines on the railroads. This we do not find in the comparatively new air carrier industry and in particular with reference to the classification of aircraft flight engineer here involved. Technological change, differences in equipment and individual company policy, governmental regulation and labor bargaining have had such impact upon the functions and duties of the flight engineer during the short twenty-year life of such classification as to make its name a misnoner on some air lines.
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> 3 NMB Determinations 56, 64.

The month after this determination was made the Secretary of Labor and the Chairman of the National Mediation Board issued public statements to the effect that the *United Air Lines* case did not necessarily control future cases. See NMB, 27th Ann. Rep. 20-21 (1961). Despite its apparent inability to formulate any policy establishing the proper groupings to be made among members of the cockpit crew in the air transport industry, the Board in this case drew craft or class lines without any investigation worthy of the name and in a manner contrary to the most recent of its three published determinations on the point and consistent with only one of them.[2]

In *Railway Clerks* this Court stated that ". . . Where the unions have agreed and the unit they have agreed upon has been one well established in industry bargaining circles, it [the Board] has usually held elections without full-scale hearings, not because the unions agree but because the unit upon which they agree is one that

[2]The Petitioner herein did not participate in any of these cases.

is well-recognized under prior determinations of the Board and has proven satisfactory in actual experience" (380 U.S. at 665). However accurate a characterization of the Board's practice with respect to the craft or class involved in that case, this statement does not describe the Board's action here. The crafts or classes established by the Board are not well-recognized under prior determinations; neither have they proven satisfactory in actual experience. On the contrary experience has furnished the National Mediation Board and the air transport industry with compelling evidence of the unwisdom of separating for bargaining purposes closely related employees working together in aircraft cockpits. Thus, the Twenty-Fifth Annual Report of the Board describes a dispute between Eastern Airlines and the Flight Engineers International Association culminating in a thirty-eight day strike when the Eastern Air Lines Chapter, FEIA, rejected the recommendation of an Emergency Board appointed by the President that flight engineers be required to possess certain pilot qualifications. See NMB, 25th Ann. Rep. 11-12 (1959). Similarly, the Twentieth Annual Report of the Board refers to a twelve-day strike at Trans-World Airways called by the Airline Navigators Association when the carrier discontinued the use of navigators on Rome-Paris flights. See NMB, 20th Ann. Rep. 6 (1954).

When a neutral committee appointed by the Board determined in 1961 that the entire flight deck crew at United Airlines constituted one craft or class, flight engineers walked out at seven carriers, shutting down operations. The President immediately appointed a commission to investigate the controversy, the so-called Feinsinger Commission. This body recommended that, among other things, a merger agreement should be

reached between the Flight Engineers International Association and the Air Line Pilots Association and that the third member of the new three man crew on turbojets be a flight engineer (as required by longstanding CAB regulations) with pilot qualifications. All this is related by the Board in its Twenty-Seventh Annual Report. See NMB, 27th Ann. Rep. 19-22 (1961). The Commission's recommendation on the issue of requiring pilot qualifications of flight engineers was followed by three Emergency Boards appointed by the President upon the recommendation of the Board under Section 10 of the Railway Labor Act (45 U.S.C. § 160) [Report of Emergency Board No. 146 appointed by Executive Order 1011, March 20, 1962 (1962); Report of Emergency Board No. 144 appointed by Executive Order 11006, Feb. 22, 1962 (1962); Report of Emergency Board No. 136 appointed by Executive Order 10923, Feb. 24, 1961 (1961)] and repeats the recommendation of an earlier Emergency Board [Report of Emergency Board No. 120 appointed by Executive Order 10749, Jan. 21, 1958 (1958).] The position of the Feinsinger Commission that ALPA and FEIA should merge echoes the conclusion of a committee of AFL-CIO international vice presidents appointed to consider charges by FEIA that its jurisdiction was being infringed by ALPA. (See Report of Emergency Board No. 120, *supra*, at 9-10.) The Board has reported that a strike of flight engineers at Continental Airlines was settled when the Continental Air Lines Chapter of FEIA was merged with ALPA [See NMB, 27th Ann. Rep. 11 (1961)]. The reports of the various Emergency Boards show that the movement toward coalescence of pilots and flight engineers, with pilot's acquiring a flight en-

gineer's license and flight engineers obtaining a commercial pilot's license, has been impeded by separate representation of the two classifications. Inevitably involved in this situation are baffling problems of integrating separate seniority lines and adjusting the institutional interests of competing labor organizations. Experience has demonstrated that these problems are tied together in a gordian knot which is yielding only to the sword of industrial warfare.

Against this background of clashing precedent and bitter conflict it clearly appears that the Board in this case did not meet its statutory obligation to investigate the dispute. It reached its determination in the absence of a preexisting policy of general applicability and without any examination of the facts relevant to a case by case determination—without, in other words, a rational basis for decision.

The Court of Appeals erred in failing to consider whether the Board has performed its statutory duty to investigate the representation dispute and in failing to conclude that the Board did not perform that duty in this case; its mandate to the district court was erroneous as well. The court below directed the district court to dismiss the action in *World Airways, Inc. v. National Mediation Board, et al.* and to dismiss the counterclaim and issue an injunction as prayed for by the Government in *United States v. World Airways, Inc., et al.* If the Court of Appeals viewed these cases as controlled by the holding of *Railway Clerks* that carriers are not entitled to hearings before the Board in representation disputes, it should not have foreclosed Petitioners' right, on remand to the district court, to amend or supplement their pleadings to raise the issue of the Board's per-

formance of its obligation of investigation. While *Railway Clerks* refutes a claim of right to hearing before the Board on the part of any carrier, the answer to the question whether the Board has satisfied the responsibility of investigation shifts from case to case depending upon the circumstances of each case. The conclusion of this Court that the Board had conducted an adequate investigation in *Railway Clerks* does not and cannot dispose of the question whether the Board's investigation of the dispute involving World Airways met the statutory standard.

If, contrary to Petitioners' belief, these cases should not be disposed of by examining the Board's action and determining that the Board did not perform its statutory duty, then both those questions should be left open for decision by the district court on remand upon appropriate amendment of the pleadings. Although a motion for leave to amend under Rule 15 of the Federal Rules of Civil Procedure is addressed to the discretion of the district court, once a responsive pleading has been filed, these are cases in which leave should be granted. As this Court has stated:

> "Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed 1948), §§ 15.08, 15.10.
>
> "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments

previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.' * * *"

Foman v. Davis, 371 U.S. 178, 182 (1962).

Intervening decisions clarifying the law or establishing new principles, such as *Railway Clerks,* furnish an appropriate occasion for granting leave to amend.

See:

Emich Motors Corp. v. General Motors Corp., 229 F. 2d 714 (7th Cir. 1956);

American Optical Co. v. New Jersey Optical Co., 50 F. Supp. 806 (D. Mass. 1943).

Ordinarily, an inferior court has no power to deviate from the mandate issued by an appellate court.

See:

Briggs v. Pennsylvania R. Co., 334 U.S. 304 (1948);

Britton v. Dowell, Inc., 243 F. 2d 434 (10th Cir. 1957).

If the Court of Appeals was not required to consider the important issues of the Board's performance of its function, then it should not also have precluded resolution of those issues in the district court. This the court purported to do although the Petition for Rehearing was directed specifically to this point. The mandate should have provided expressly that dismissal was to be without prejudice to amend, as in *OCAW v. Delta Refining Co.,* 277 F. 2d 694 (6th Cir. 1960), and *Sears, Roebuck & Co. v. Marhenke,* 121 F. 2d 598 (9th Cir. 1941), and there should have been no direction to issue

an injunction as requested by the Government since, if the answer were amended, the district court could well conclude that the failure of the Board to investigate as required constitutes a defense to the action brought by the United States.

Conclusion.

The court below neglected to review the adequacy of agency action in investigating a representation dispute under the Railway Labor Act; it thereby reached a decision in conflict with a governing decision of this Court. In failing to supervise the National Mediation Board in the exercise of its functions, the Court of Appeals left open a question—the scope of the Board's duty to investigate—which has not been and should be decided by this Court. Finally, by issuing to the district court a mandate which foreclosed that court from resolving the issues which the Court of Appeals did not itself decide, it sanctioned a departure from the ordinary course of judicial proceedings which this Court should correct. For these reasons, the writ of certiorari sought herein should be granted.

Respectfully submitted,

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JAN VETTER,
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Attorneys for Petitioners, World Airways, Inc., Edward J. Daly and Peter T. Craven.

APPENDIX.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

World Airways, Inc., Appellant, vs. National Mediation Board, et al., Appellee. No. 19,552.

United States of America, Appellant, vs. World Airways, Inc., Appellee. No. 19,465.

[June 21, 1965]

Appeal from the United States District Court, for the Northern District of California, Southern Division.

Before: Orr, Browning and Duniway, Circuit Judges.

Per Curiam.

These two appeals were argued together. They present substantially the same questions. In No. 19,552 World Airways, an air carrier subject to the jurisdiction of the National Mediation Board under the Railway Labor Act (45 U.S.C. §§151, et seq.) sought to enjoin the Board and its members (1) from determining the appropriate crafts or classes among certain of its employees for purposes of collective bargaining, without affording it an opportunity to be heard on the issue of appropriate craft or class, (2) from conducting an election among its employees in any craft or class in which the form of ballot does not permit an eligible employee to cast a ballot against representation. It also sought a declaration of rights and a mandatory injunction requiring that it be granted a hearing and that the Board use the form of ballot which it considered proper.

In No. 19,465 the United States, on behalf of the Board, sought an injunction under 45 U.S.C. §152

which would require World Airways to give the Board access to its records in order to enable the Board to carry out its duties under the Act. The record shows that the refusal by World Airways to give such access is based upon the same contentions as it raises in its complaint in No. 19,552. World Airways counterclaimed for the same relief that it requested in No. 19,552, and on the same grounds.

In No. 19,552 the court denied World Airlines' motion for a preliminary injunction and denied the Board's motion for an order dismissing the complaint or for summary judgment, without prejudice to either party to renew such motions at such time as three cases then pending in the United States Supreme Court were finally decided, or at such time as the Board might agree to use a form of ballot which would permit an eligible employee to cast a ballot against representation, whichever time might be sooner. World Airways appeals. In No. 19,465 the court entered a similar order denying the United States' application for an injunction and denying World Airways' motion for an injunction comparable to that requested by it in No. 19,552, on the same terms. Both parties appeal.

These cases are controlled by the decision of the United States Supreme Court in the consolidated cases of *Brotherhood of Railway and Steamship Clerks v. Association for the Benefit of Non-Contract Employees, United Air Lines, Inc. v. National Mediation Board,* and *National Mediation Board v. Association for the Benefit of Non-Contract Employees,* decided by the Supreme Court on April 28, 1965 (.... U.S. ....). In those cases the Court held that the carrier is not entitled to a hearing such as was demanded by World Airways in the

present cases, and that the form of ballot used by the National Mediation Board is not subject to the attacks which are directed at it by World Airways. It follows that World Airways is not entitled to any relief in action No. 19,552. Moreover, since the only defenses asserted in the government's action in No. 19,465 are the same two contentions, it follows that World Airways has no valid defense to that action, and that the District Court should have issued the order requested by the government in that case. (*Cf. Federal Communications Commission v. Shreiber,* decided by the Supreme Court on May 24, 1965 (.... U.S. ....).

In No. 19,552 the order appealed from is reversed and the matter is remanded to the District Court with directions to dismiss the action. In No. 19,465 the order is reversed and the matter is remanded to the District Court with directions to dismiss the counterclaim of World Airways, Inc., and to issue an injunction as prayed for by the United States.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 832

WORLD AIRWAYS, INC., ET AL., PETITIONERS

v.

NATIONAL MEDIATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

On November 7, 1963, the Airline Division of the International Brotherhood of Teamsters filed an application with the National Mediation Board pursuant to § 2, Ninth of the Railway Labor Act, 45 U.S.C. 152, Ninth, for an investigation of an alleged representation dispute among those employees of the petitioner World Airways, Inc. who were members of the three crafts of Airline Pilots, Flight Engineers and Flight Navigators, all of whom had previously been unrepresented for collective bargaining purposes (R. 15, 29).[1]

Shortly after the application was filed, the carrier

[1] "R." refers to the record below in *World Airways, Inc.* v. *National Mediation Board, et al.*

207-285--66

informed the Board that it believed that such employees constituted one craft instead of three; "demand[ed] the right under the Railway Labor Act to participation in a hearing on the class or craft issue"; and sought the Board's assurance that, in any representation election which might be held, the Board would not use its traditional form of ballot but would use one containing spaces for employees to mark votes against any representation (R. 32–33).[2] The Board rejected the carrier's demands (R. 40), and requested the carrier to supply the Board's mediator with the names and addresses of the employees involved (R. 36). World Airways refused to give the mediator access to its payroll books and records, from which he could obtain the information (R. 41).

Instead, the carrier brought suit against the Board and its members for an injunction restraining the Board (1) from conducting any election or certifying any representative without first affording the carrier a hearing on the craft issue, and (2) from conducting an election with the Board's traditional form of ballot (R. 8). The United States then filed an action against the carrier and two of its officers to restrain them from refusing the Board access to the payroll books and records (Pet. App. 1–2). The two actions were consolidated for trial, and the district court denied both injunctions (Pet. App. 2).

---

[2] The form of ballot which the National Mediation Board has employed since 1934, does not contain spaces for employees to mark votes against any collective bargaining representative. Employees who wish so to vote do so by not casting ballots. See, *Railway Clerks* v. *Employees Assn.*, 380 U.S. 650, 656–657, 668–671.

On cross appeals, the Court of Appeals for the Ninth Circuit affirmed the denial of the injunction that petitioners had sought, and directed that their complaint be dismissed (Pet. App. 3). The court, pointing out that petitioners' only two contentions were (1) that the carrier was entitled to demand and participate in a hearing on the appropriate craft and (2) that the Mediation Board's form of ballot was unlawful, held that the case was controlled by *Railway Clerks* v. *Employees Assn.*, 380 U.S. 650, where this Court last Term rejected the identical arguments. The court of appeals further held that since these contentions also constituted petitioners' sole defense in the suit by the United States, the latter was entitled to relief and directed the district court to issue the injunction which the government sought (Pet. App. 3).

Relying upon the statement in *Railway Clerks* v. *Employees Assn., supra,* 380 U.S. at 661, that the Mediation Board's action "is reviewable only to the extent that it bears on the question of whether it performed its duty to 'investigate' the dispute," petitioners argue (Pet. 12–15, 20–23) that the Board did not properly perform its investigatory duty and that the court of appeals erred in failing to consider this matter. Since petitioners did not make this contention at all in the district court and made it in the court of appeals only in oral argument (R. 3–9, 32–33, 53–54, 79–80, 103–106, 108–109), the court of appeals was fully justified in treating the cases as involving

only the two issues which this Court resolved against petitioners in *Railway Clerks, supra.* In any event, the contention is premature at the present time.

The Board has not completed the performance of its statutory duty to investigate the representation dispute. For petitioners, by refusing the Board access to their books and records which contain the names and addresses of their employees,* have prevented the Board from performing that function. Indeed, petitioners' refusal has prevented the Board even from determining finally whether there is a genuine representation dispute which it should investigate.

The Board's regulations provide that it will not investigate a representation dispute unless the application is accompanied by employee authorization cards covering a designated percentage of employees, 29 C.F.R. 1206.2(b). After an application is received, the Board requests the carrier to furnish the number of employees in the craft or crafts involved but not their names and addresses (R. 15–16). The Board requires this information to make a *preliminary* determination whether the applicant submitted a sufficient number of authorization cards. The carrier

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* Section 2, Ninth of the Railway Labor Act, 45 U.S.C. 152, Ninth, provides: "The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

provided such information here (R. 16, 29). On the basis of this preliminary determination, the Board either dismisses the application or dockets it as a representation dispute and assigns a mediator to investigate it. After the case has been docketed, the mediator examines the carrier's records so that a *final* determination can be made whether a sufficient number of authorization cards were submitted. In order to make this determination, the Board needs the names of the employees to check them against the signatures on the authorization cards (R. 17–18).

The Board investigates and attempts to resolve a representation dispute only after it has finally determined that such a dispute exists; and it is only as part of that investigation that the Board decides whether to hold an election and what employees should participate therein (*i.e.*, what is the appropriate craft). Since in the present case the carrier refused to permit the Board to examine its books and records to ascertain finally whether a sufficient number of authorization cards were submitted, there is no valid issue in this case at this time whether the Board properly performed its statutory duty of investigation. For upon examination of the carrier's records the Board might discover that an insufficient number of valid authorization cards were submitted with respect to each of the job classifications involved. In that event the Board would dismiss the application regardless of whether these job classifications constitute one

or three crafts.[4] The issues which petitioners raise, therefore, cannot arise unless and until the Board, on the basis of a final determination that a sufficient number of authorization cards have been submitted, decides to investigate and to attempt to resolve the dispute;[5] and it cannot make that determination unless and until it examines the carrier's records.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

THURGOOD MARSHALL,
Solicitor General.

FEBRUARY 1966.

[4] It is of course true that in determining whether a sufficient percentage of authorization cards have been submitted so as to give rise to a representation dispute as defined by the Board's rules, the Board may in some cases have to make a preliminary determination as to the appropriate craft lines. We have been advised by the Board that such preliminary determinations, where necessary, are made on the basis of previously established craft lines. However, even where the Board must make a preliminary craft determination in order to decide whether the requisite number of authorization cards have been submitted, such determination does not necessarily control the resolution of the representation dispute, and the Board will investigate the question of the appropriate craft in connection with the holding of a representation election.

[5] In *Railway Clerks* v. *Employees Assn.*, *supra*, upon which petitioners rely, the carrier did not institute judicial proceedings until after the National Mediation Board had "concluded that a dispute existed requiring an election and scheduled one for January 1963." 380 U.S. at 655.

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IN THE

Supreme Court of the United States

October Term, 1965
No. 832

WORLD AIRWAYS, INC.,

Petitioner,

vs.

NATIONAL MEDIATION BOARD: FRANCIS A. O'NEIL, JR., individually and as Chairman of the National Mediation Board; LEVERETT EDWARDS, individually and as member of The National Mediation Board; and HOWARD G. GAMSER, individually and as member of The National Mediation Board,

Respondents.

WORLD AIRWAYS, INC., EDWARD J. DALY and PETER T. CRAVEN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

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SUBJECT INDEX

	Page
Reasons for granting rehearing and issuing the writ	2
Conclusion	5

TABLE OF AUTHORITIES CITED

Case

Brotherhood of Ry. & S.S. Clerks v. Association for the Benefit of Non-Contract Employees, 380 U.S. 650	2

Rules

Federal Rules of Civil Procedure, Rule 15	3

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Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

Petitioner prays that this Court grant rehearing of its order of February 28, 1966 denying the Petition for Writ of Certiorari and that a Writ of Certiorari issue to review the Judgment of the Court of Appeals for the Ninth Circuit in the above-entitled cases as prayed for in the Petition filed December 17, 1965.

Reasons for Granting Rehearing and Issuing the Writ.

On February 28, 1966 the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit was denied by this Court. Since no reasons were assigned by the Court for the denial of certiorari, it is not clear which of the arguments presented by the Solicitor General was thought to be determinative. The first ground urged by the Solicitor General in opposition to the petition for a writ of certiorari was that the Petitioners' argument to the effect that the Board had not properly performed its investigatory duty had not been properly presented in the District Court or the Court of Appeals. (Memo. for Resp. pp. 3-4.) The failure to more clearly enunciate the argument in the District Court was due to the fact that the principles upon which that argument is based was not clearly set forth until the decision of the Supreme Court of the United States in *Brotherhood of Ry. & S.S. Clerks v. Association for the Benefit of Non-Contract Employees* (1965), 380 U.S. 650. The principles upon which the argument is based were clearly set forth in the argument in the Court of Appeals, but the Court of Appeals apparently considered itself limited by the complaint even though this Court did not so consider itself limited in judging a similar complaint in the *Railway Clerks* case, *supra*. If the denial of the petition for the writ of certiorari was because the issues were thought to have not been properly presented in the lower courts, the most appropriate disposition of

the case would be a remand, granting leave to amend in order to allow the questions to be properly presented. *See:* Rule 15 of the Federal Rules of Civil Procedure.

The argument principally relied on by the Government is that the questions presented by this dispute are not ripe for determination at this time. (Memo. of Resp. pp. 4-6.) It is asserted that the National Mediation Board has not completed its investigation and that no determination has yet been made of the appropriate class or craft. Therefore, according to the Government, any inquiry into the nature of the investigation made in order to determine the appropriate class or craft is premature. However, the Government, itself, recognizes that the only reason the Board needs the names and addresses of the employees is to make a final comparison with the signatures on the authorization cards. (Memo. of Resp. p. 4.) This final checking is to determine whether the rquired percentage of employees *in an appropriate class* has requested representation. Thus the request to examine the Petitioner's books necessarily presumes a determination as to the appropriate class or craft. A review of the record in the present case makes it abundantly clear that the Board has made a determination as to the appropriate class without conducting any investigation, and that all that remains to be done is the ordering of an election. Since it is clear that the Board has made such a determination, questions as to whether that determination was made in the light of an appropriate investigation should be considered by the Court at this time.

That the Board's intention is to immediately conduct an election without additional investigation except for the final checking of the names, is amply demonstrated by the Board's failure to agree to the suggestion made by counsel for the Petitioner on January 1, 1964. [R. p. 85.][1] At that time, the Petitioners offered to provide access to the books and records requested by the Board if, in return, the Board would agree to defer any mailing of ballots or other election procedures until 20 days after the announcement of its decision concerning the appropriate class or craft. The 20 day period was requested in order to allow the carrier the minimum amount of time necessary to apply for relief from the courts in the event that the Board's decision was not supported by the facts as they were unveiled in an appropriate investigation. It is apparent that the Board considers the checking of the names the final step before ordering an election and that a final determination as to the appropriate craft or class is made before such a check. In addition to demonstrating that the Board does not intend to conduct any further investigation, the offer by the Petitioners also demonstrates their good faith and willingness to comply with any reasonable request made by the Board as long as the Petitioner is provided with an opportunity to question the Board's procedures.

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[1]Citation is to the record in World Airways, Inc, v. National Mediation Board, *et al.*

Conclusion.

In summary, the questions presented are not in any respect premature since it is abundantly clear that the Board has made a craft or class determination upon which it intends to act. Whether that determination was made without an appropriate investigation is a question which should properly be considered by the Court at this time. Failure to consider the question now will result in needless litigation after the Board orders an election.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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JEROME C. BYRNE,
JAN VETTER,
WESLEY G. HOWELL, JR.,
Attorneys for Petitioners, World Airways, Inc., Edward J. Daly and Peter T. Craven.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

JEROME C. BYRNE